Supreme Court, U.S.
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NO. 96-303

In The

Supreme Court of The United States

October Term 1995

HUMAN SERVICES PLAZA PARTNERSHIP,
Petitioner,

v.

THE HUNTINGTON NATIONAL BANK;
THE HUNTINGTON MORTGAGE COMPANY;
THE HUNTINGTON COMPANY,
Respondents.

On Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Questions Presented	1
Statement of The Case	2
1. The Contract Claim	2
2. The Promissory Estoppel Claim	2
3. Four Statutes of Frauds	4
4. The Federal Trying Claims	5
5. The Judicial Review Process	9
Reasons for Denying The Writ	10
Conclusion	11

TABLE OF AUTHORITIES

Cases

	Page
Shaffer v. Maier, 68 Ohio St.3d 416, 627 N.E.2d 986 (1994)	2
Master Consolidated Corp. v. BancOhio National Bank, 61 Ohio St.3d 570, 575 N.E.2d 817 (1991)	2
Sanders v. First National Bank & Trust Co., 936 F.2d 273, 278 (6th Cir. 1991)	8
Rae v. Union Bank, 725 F.2d 478, 480 (9th Cir. 1984)	8
Parsons Steel, Inc. v. First Alabama Bank of Montgomery, 679 F.2d 242 (11th Cir. 1982)	8

Other Authorities

Fed. R. Civ. Proc. 51	3
Ohio Rev. Code §§ 1301.12(A), 1335.05, 1775.11	4
12 U.S.C. § 1972	5, 7
Fed. R. Evid. 702	8

QUESTIONS PRESENTED

1. Whether the courts below correctly applied Ohio law to reject the petitioner's contract and promissory estoppel claims, where (a) no evidence showed that the respondent bank held the purported agent out as possessing authority to set terms and commit the bank for a 78 month $23,500,000 letter of credit; (b) undisputed evidence established that the petitioner had no good faith reason to believe the purported agent had such authority; (c) Ohio's statutes of frauds preclude enforcement of any such oral promise, and (d) the petitioner failed to complain seasonably about any claimed procedural complications.

2. Whether the district court properly exercised its discretion when it declined to receive opinion evidence that an "entireties clause" was an "unusual banking practice" which allegedly violated tying restrictions in the Bank Holding Company Act, where (a) the petitioner's pleading made no such claim, (b) no evidence showed that the "entireties clause" was anticompetitive conduct, which is an essential element of a Bank Holding Act claim, and (c) the "entireties clause" imposed no meaningful burden by discouraging a legally meritless claim.

3. Whether the Ohio law of damages established alternative grounds for affirmance.

4. Whether the district court should have ruled on the respondents' alternative motion for a partial new trial.

CORPORATE PARTIES

The respondents are the Huntington National Bank (a traditional full service bank), the Huntington Mortgage Company (a commercial project mortgage lending company), and the Huntington Company (an investment banking company). These three respondents are each wholly owned subsidiaries of Huntington Bancshares, Inc. (a publicly traded bank holding company), which is not a party to this case.

STATEMENT OF THE CASE

Ohio law controls most of the substantive issues in this case. A jury rejected the only federal claim that the district court submitted for their consideration. The petitioner misreads the rulings below, and proposes a new version of the evidence, in an attempt to suggest that some unresolved but pervasive issues require review. In fact, this is basically a garden variety state law contract case.

1. The Contract Claim

Most of the proceedings below centered on the petitioner's claim under Ohio law that the respondent bank breached an oral commitment to sell the petitioner a 78 month $23,500,000 letter of credit.

Applying Ohio substantive law for this supplemental jurisdiction claim, both the district court and the court of appeals ruled as a matter of law that the purported agent lacked actual or apparent authority to make such an extravagant oral commitment. See *Shaffer v. Maier*, 68 Ohio St. 3d 416, 627 N.E.2d 986 (1994); *Master Consolidated Corp. v. BancOhio National Bank*, 61 Ohio St. 3d 570, 575 N.E.2d 817 (1991).

No evidence showed that the respondent bank held the purported agent out as possessing authority to set the terms or commit the respondent bank for a 78 month $23,500,000 letter of credit. Undisputed evidence denied that the petitioner had a good faith reason to believe the purported agent had such authority.

2. The Promissory Estoppel Claim

Ohio law also precludes a promissory estoppel claim when the purported agent lacked actual or apparent authority to make the disputed promise. *Master Consolidated*, 61 Ohio St. 3d 570, 575 N.E. 2d 817 (1991). No evidence demonstrated that the

agent had actual authority. Petitioner relied on the agent's apparent authority. As the petitioner correctly stated in its appeals court brief at pp. 43-44:

> . . .in order for the jury to have found apparent authority in Count II [the contract claim], it, by necessity, had to have found good faith and reliance by HSPP [the petitioner partnership]. The same test is used for both apparent authority and promissory estoppel. In fact, apparent authority is an estoppel issue.

Accordingly, the rulings below that the evidence failed to show apparent authority disposed of both the contract claim and the promissory estoppel claim.

Moreover, the petitioner repeatedly waived any complaint about the verdict which denied its promissory estoppel claim:

a. The petitioner asserted no objection when the district court instructed the jury that the petitioner's promissory estoppel claim requires proof that the Huntington Mortgage Company official had apparent authority to promise the requested letter of credit (See Fed. R. Civ. Proc. 51);

b. With the petitioner's express agreement, the district court submitted the promissory estoppel claim as an alternative to the contract claim with a lesser measure of damages, if and only if the jury rejected the contract claim. When the jury approved the petitioner's contract claim, they followed the instructions which the petitioner expressly approved, by finding against the petitioner on the promissory estoppel claim;

c. The petitioner made no motion, suggestion or argument regarding its promissory estoppel claim when it

responded to the respondents' post-trial motion for judgment as a matter of law on the petitioner's contract claim;

d. The petitioner later asked the appeals court to reinstate the jury's contract verdict as an award on its promissory estoppel claim, even though Ohio measures the damages for the two claims differently, and never sought a new trial on its promissory estoppel claim.

3. Four Statutes of Frauds

Ohio's statutes of frauds precluded judicial enforcement of the alleged oral contract which supposedly required the bank to provide a letter of credit which would (a) guarantee the petitioner partnership's debt to bond purchasers, (b) for 78 months, (c) for annual payments that exceed $5,000, (d) with a mortgage on land as security. See Ohio Rev. Code §§1301.12(A), 1335.05; 1775.11. The alleged oral contract would guarantee another's debt, could not be performed within one year, would sell intangible property for more than Ohio's limit on oral sales, and would affect an interest in land.

In the trial court, the petitioner partnership argued that none of these statutes govern this transaction, or that some writing somehow satisfied these statutory requirements. The 3774 page trial transcript contains one sentence in which petitioner's counsel argued that some undefined partial performance might satisfy the statute which precludes oral "real estate transactions." Otherwise, the petitioner never mentioned "partial performance" in any trial court pleading or any trial court brief, not even its response to the respondents' post-trial motion on the statute of frauds issue.

In the court of appeals, the petitioner argued for the first time that the petitioner satified all statutes of frauds by its "partial performance" of its project. The petitioner contended that it

could enforce a November oral commitment for a 78 month $23,500,000 letter of credit because the bank loaned it $825,000 in July to acquire part of the land for its project. The petitioner has not cited any Ohio case law for the extraordinary contention that making one loan in July is part performance of a promise in November to perform another transaction. The appeals court simply declined to consider this argument because it first surfaced on appeal.

The courts below focused on the Ohio statute of frauds which bars enforcement for oral contracts that cannot be performed within one year. They did not reach the bank's contentions that three other Ohio statutory provisions also render this alleged oral contract uneforceable.

4. The Federal Tying Claims

After multiple amendments, the petitioner's Complaint ultimately included a claim that the respondents violated tying restrictions in the federal Bank Holding Company Act (12 U.S.C. §1972) by requiring four specific conditions for the petitioner's loan transactions. The district court's rulings pared those four tying claims down to one for the jury's consideration, and the petitioner never appealed those rulings.

The tying claim which the district court submitted to the jury alleged that the Huntington National Bank conditioned its potential letter of credit transaction on the petitioner's agreement to employ the Huntington Company for related bond sales. The jury returned a verdict in the respondents' favor and against the petitioner on that tying claim. Further, the jury answered "No" to the court's interrogatory: "Do you find that the Huntington National Bank required HSPP [the petitioner partnership] to hire the Huntington Company in order to obtain a letter of credit from the Huntington National Bank?"

The petitioner's appeal from the district court's judgment did not complain about the district court's jury instructions for that tying claim, the jury's verdict on that claim, the jury's answer to the related interrogatory, or the district court's denial of the petitioner's post-trial motion for judgment as a matter of law on that tying claim.

Instead, the petitioner argued on appeal that the district court "dismissed" an additional tying claim by improperly excluding opinion evidence which might have supported that different claim. In fact, the petitioner never alleged that additional claim in its pleading and never sought or obtained leave to add that claim. The petitioner inartfully contends that the district court dismissed a non-existing claim.

As the court of appeals explained, the petitioner's real complaint is the district's ruling on opinion evidence which the petitioner proferred late in the trial to support a previously unpleaded tying claim. The petitoner wanted to assert that the bank should not have included an "entireties clause" in a formal loan commitment offer which the petitioner disfavored and never accepted. The allegedly unlawful paragraph provided:

> 28. This Commitment Letter constitutes the entire understanding and agreement of the parties with respect to the subject matter hereof, superseding any and all negotiations and discussions between the parties. No other documents, instruments or similar written on [sic] verbal matters preceding the date hereof shall or may be used to vary or alter the provisions hereof.

The petitioner contended that terms in the bank's proposed Commitment Letter differed from the alleged prior oral commitment by the Huntington Mortgage Company officer. The petitioner further contended that the entireties clause effectively

"conditioned" the bank's formal Commitment Letter offer on the petitioner's release for any claim on the prior oral commitment.

The district court sustained the respondents' objection to the petitioner's expert's opinion that an "entireties clause" was "an unusual banking practice" for such a commitment letter. The petitioner apparently contends that the district court thereby abused its discretion because the proffered opinion somehow showed that the entireties clause violated tying restrictions in 28 U.S.C. §1972(1)(C):

> (1) A bank shall not in any manner extend credit . . . on the condition or requirement
>
> > (C) that the customer provide some additional property, or service to such bank, other than those related to and usually provided in connection with a loan . . .

The petitioner neither requested a jury instruction for this new tying claim, nor objected that the jury instructions omitted any reference to it. Following the trial, the petitioner made no motion for a new trial on the ground that the court rejected the proffered opinion or failed to submit the related claim for the jury's consideration. The petitioner's post-trial motion for judgment as a matter of law on its original tying claim made no reference to this new tying claim.

Contrary to the petitioner's brief in support of its petition for certiorari, neither the trial court nor the appeals court ever ruled that the petitioner's new tying claim failed because the transaction failed. While the petitioner's rejection of the bank's proposed transaction may arguably preclude the petitioner's claim that the bank "extended credit" on some unlawful condition, neither court below so held. Indeed, the district court submitted the petitioner's original tying claim to the jury, despite the fact that the transaction failed and the bank extended no credit.

The trial court rejected the proposed expert opinion without a detailed explanation and without a request by the petitioner for a more detailed explanation. The appeals court affirmed that evidentiary ruling on an abuse of discretion standard. The unstated reasons for the evidentiary ruling might well include the failure of the proffered opinion evidence to satisfy Evidence Rule 702, its lack of relevance to the pleaded issues, and its use to raise a prejudicially tardy claim.

Further, the district court repeatedly asked the petitioner to provide any authority for its claim that a bank cannot lawfully condition a customer's transaction on the resolution of any further controversy with that customer. Petitioner's counsel could not find a single case to support that contention.

Additionally, the court of appeals noted that the petitioner can hardly complain that the bank required the petitioner to release its claim on a supposed oral commitment, when the district court and the court of appeals have both held that any such claim lacks merit. Assuming *arguendo* that the bank could not lawfully condition a transaction on the customer's release of some valid claim against the bank, a condition that the customer release an invalid claim does not require "that the customer provide some additional property."

As the appeals court stated, the rulings that deny any legally cognizable oral promise render moot any contention that the release of a claim based on that supposed oral promise was an unlawful condition.

In any event, the exclusion of that evidence could not be prejudicial because no evidence showed that the allegedly unlawful condition had any anti-competitive affect. A condition for credit cannot violate the Bank Holding Company Act unless it hampers competition. *See Sanders v. First National Bank & Trust Co.*, 936 F.2d 273, 278 (6th Cir. 1991); *see also Rae v. Union Bank*, 725 F.2d 478, 480 (9th Cir. 1984); *Parsons Steel, Inc. v. First Alabama Bank of Montgomery*, 679 F.2d 242 (11th Cir. 1982).

5. The Judicial Review Process

The petitioner obtained a favorable verdict on its contract claim that the Huntington National Bank declined to sell the petitioner a 78 month $23,500,000 letter of credit on the petitioner's terms, pursuant to a supposed oral commitment by a Huntington Mortgage Company official.

Thereafter, the district court's fifty-three page opinion and order granted the respondents' post-trial motion for judgment on that Ohio contract claim. In its opinion, the district court ruled as a matter of law that the petitioner failed to show the purported agent's authority for the alleged commitment, and that Ohio's statute of frauds rendered the alleged oral contract unenforceable.

At that time, the district court judge had more than fifty years experience as an Ohio state and federal court judge. As all trial counsel noted, the judge took exceptionally meticulous notes during the trial. As his rulings on the post-trial motions impressively demonstrate, he studied those notes and the voluminous trial exhibits. The parties supplied the district court with transcripts of testimony to support their respective positions, and the court's opinion quotes additional transcript he requested and obtained for evidence he deemed significant.

On appeal, the parties provided the court with a 2257 page joint appendix, which contained everything from the trial court record that either party chose for the court's review. Briefs and oral arguments helped the court focus on particularly significant evidence.

An appellate panel that included two Ohio judges unanimously rejected all the petitioner's contentions, without reaching the respondent's alternative grounds for affirmance or the respondents' conditional cross-appeal. Apparently believing that the case had no meaningful precedential value, the panel recommended against the publication of its *per curiam* opinion.

The petitioner then sought a rehearing *en banc* with a fifteen page brief that makes no reference to any federal claim. When the court circulated the petitioner's motion, none of the fourteen active Sixth Circuit judges favored an *en banc* rehearing.

REASONS FOR DENYING THE WRIT

Nothing in this fact intensive record merits this Court's review. The courts below did not deny Due Process when they applied universally accepted standards for deciding and reviewing the sufficiency of evidence. Petitioner's counsel never asserted a Due Process argument in either court below. Petitioner cannot cite any part of the opinions below which remotely suggests that either court prevented any party from arguing about the significance of any part of the record, or that either court declined to consider the issues carefully. Petitioner simply disagrees with the rulings below.

Contrary to the petitioner's brief, neither court below required the petitioner to file post-trial motions in order to preserve its contentions on appeal. Instead, the court of appeals appropriately declined to consider new arguments that the petitioner failed to assert seasonably in the trial court.

Finally, neither court below denied that a Bank Holding Company Act violation can occur when the related credit transaction is not consummated. Indeed, the district court submitted a Bank Holding Company Act claim to the jury, despite the petitioner's refusal to accept the bank's proposed transaction. Petitioner's counsel has misread the appeals court's opinion, which rejected the petitioner's contention about an allegedly unlawful release when there was no valid claim to release.

If this Court were to grant review, it could not fully resolve the dispute without considering additional issues which the court of appeals had no need to reach, or remanding the case for the

court of appeals to address them. Thus, the respondents asserted there as alternative grounds for affirmance as a matter of law (a) the petitioner failed to show legally cognizable damages, and (b) later events after these parties abandoned any transaction were the real source of the petitioner's claimed damages. Further, the court of appeals never considered the respondents' conditional cross-appeal which complained that the trial court had not ruled on the respondents' alternative motion for a partial new trial.

CONCLUSION

For the reasons stated, the respondents respectfully urge this Court to deny this petition for certiorari. If this Court decides to accept this case, the respondents request the Court to consider the additional issues which the court of appeals did not reach, or in the alternative request this Court to remand the case to the court of appeals for that court to consider those issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On September 5, 1996, I mailed a copy of this Brief in Opposition to the Petition for Certiorari to Robert R. Kracht and Scott H. Kahn, McIntyre, Kahn, Kruse & Gillombardo, The Galleria & Towers at Erieview, 1301 E. Ninth Street, Cleveland, Ohio 44114-1824.

/s/ Richard M. Markus

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